

DATO' SERI DR KOK MEW SOON & ORS

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v.

MUSTAPHA MOHAMED & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA

B

ABDULL HAMID EMBONG JCA

HELILIAH MOHD YUSOF JCA

[CIVIL APPEAL NO: C-02-849-2007]

19 FEBRUARY 2008

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CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application to restrain receivers and managers appointed by Pengurusan Danaharta Nasional Berhad - Whether grant of said injunction barred by s. 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Stare decisis - Whether no remedy available if injunction not granted*

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CIVIL PROCEDURE: *Receiver and manager - Injunction - Application to restrain receivers and managers appointed by Pengurusan Danaharta Nasional Berhad - Whether grant of said injunction barred by s. 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Stare decisis - Whether no remedy available if injunction not granted*

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CIVIL PROCEDURE: *Jurisdiction - Court - Injunction - Application to restrain receivers and managers appointed by Pengurusan Danaharta Nasional Berhad - Whether grant of said injunction barred by s. 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Stare decisis - Whether court bound by its own decisions*

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COMPANY LAW: *Receivership - Receiver and manager - Injunction - Application to restrain receivers and managers appointed by Pengurusan Danaharta Nasional Berhad - Whether grant of said injunction barred by s. 72 Pengurusan Danaharta Nasional Berhad Act 1998 - Stare decisis - Whether no remedy available if injunction not granted*

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This was an appeal by the appellants against the order of the High Court dismissing their application for an interlocutory injunction restraining the receivers and managers appointed by Pengurusan Danaharta Nasional Berhad, the third respondent in this appeal. The only issue requiring determination was whether the grant of an injunction in the terms sought was barred by s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('Act').

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A **Held (dismissing the appeal)**
Per Gopal Sri Ram JCA delivering the judgment of the court:

- B (1) It was implicit that this court had already held in *Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals* that an injunction granted against a receiver and manager would indirectly contravene s. 72 of the Act. Accordingly, there was no alternative but to adopt and apply the decision of that case to the instant case since this court is bound by its own decisions. *Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals* (foll). The appellants' contention that they would be bereft of any remedy if the injunction was not granted was not accurate. If the receivers and managers were guilty of misconduct, then an application could be made to move the court under s. 192(2) of the Companies Act 1965 and seek the appropriate relief. (para 6)

Bahasa Malaysia Translation Of Headnotes

- E Ini adalah rayuan perayu-perayu terhadap perintah Mahkamah Tinggi kerana menolak permohonan mereka untuk injunksi interlokutori bagi menghalang penerima dan pengurus yang dilantik oleh Pengurusan Danaharta Nasional Berhad, responden ketiga di rayuan di sini. Satu-satunya isu yang berbangkit adalah sama ada pemberian injunksi dalam terma-terma yang dipohon di sini dilarang oleh s. 72 Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta').

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- H (1) Adalah jelas bahawa mahkamah ini di dalam *Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals* telah pun memutuskan bahawa suatu injunksi yang diberikan kepada penerima dan pengurus secara tidak langsung adalah melanggar s. 72 Akta. Oleh itu, mahkamah tiada alternatif melainkan menerima dan menggunapakai keputusan kes tersebut kepada kes semasa kerana mahkamah ini terikat dengan keputusannya sendiri. *Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals* (diikuti). Hujah perayu-perayu bahawa mereka tidak mempunyai apa-apa remedi jika injunksi tidak diberi

adalah silap. Jika penerima dan pengurus melakukan salah laku, permohonan boleh dibuat untuk menggerakkan mahkamah di bawah s. 192(2) Akta Syarikat 1965 bagi mendapatkan relif-relif sewajarnya.

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Case(s) referred to:

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC (**refd**)
Gomba Holdings UK Ltd & Ors v. Minorities Finance Ltd & Ors [1989] 1 All ER 261 (**refd**)

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Hendry v. Druz [1949] MLJ Supp 25 (**refd**)

Re B Johnson & Co Ltd [1955] 2 All ER 775 (**refd**)

Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd & Other Appeals [2008] 1 CLJ 169 CA (**foli**)

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Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors & Anor Appeal [2007] 4 CLJ 513 FC (**refd**)

Silven Properties Ltd & Another v. Royal Bank of Scotland Plc & Others [2004] 4 All ER 484 (**refd**)

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Legislation referred to:

Companies Act 1965, s. 192(2)

Pengurusan Danaharta Nasional Berhad Act 1998, s. 72

Other source(s) referred to:

Lightman J, *Silven Properties*, p 494

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For the appellants - Malik Intiaz Sarwar (Gabriel Daniel & Ang Kok Chun with him); M/s Paul Ong & Assocs

For the 1st & 2nd respondents - V Vijakumar; M/s Albar & Partners

For the 3rd respondents - Tommy Thomas; M/s Tommy Thomas

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[*Appeal from High Court, Kuantan; Suit No: 22-100-2007*]

Reported by Suresh Nathan

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JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

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[2] This appeal is directed against the order of the Kuantan High Court dismissing the appellants' application for an interlocutory injunction restraining the receivers and managers appointed by Pengurusan Danaharta Nasional Berhad (Danaharta), the 3rd respondent before us.

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A [3] We will assume, without deciding, only for the purposes of
this appeal, that the material produced before the learned judge
and before us discloses serious questions to be tried. The only
issue before us is whether the grant of an injunction in the terms
sought is barred by s. 72 of the Pengurusan Danaharta Nasional
Berhad Act 1998 (“the act”). There has been quite a lot of
litigation about the act and for that reason we will not say much
about the body it created. We will go straight into s. 72. That
section provides:

C 72. Notwithstanding any law, an order of a court cannot be
granted:

(a) which stays, restrains or affects the powers of the
Corporation, Oversight Committee, Special Administrator
or Independent Advisor under the Act;

D (b) which stays, restrains or affects any action taken, or
proposed to be taken, by the Corporation, Oversight
Committee, Special Administrator or Independent Advisor
under the Act;

E (c) which compels the Corporation, Oversight Committee,
Special Administrator or Independent Advisor to do or
perform any act,

F and any such order, if granted shall, be void and
unenforceable and shall not be the subject of any process of
execution whether for the purpose of compelling obedience of
the order or otherwise.

G [4] It has already been decided that the section is constitutional
and bars the grant of injunctions against Danaharta (see *Danaharta
Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701) and that it
excludes judicial review (see *Pengurusan Danaharta Nasional Bhd v.
Tang Kwor Ham & Ors and Anor Appeal* [2007] 4 CLJ 513). But
it must be said in fairness to the appellants that their counsel has
reserved the right to re-argue the constitutionality point at the
appropriate stage.

H [5] The question we have to decide is this. Would the grant of
an injunction against the receivers and managers appointed by
Danaharta offend s. 72? The identical question came up before
this court in the case of *Marina Mohd Yusoff v. Pekeliling Triangle
Sdn Bhd & Other Appeals* [2008] 1 CLJ 169 where at p. 187, the
court reproduced the following passage from the judgment of the
High Court:

The Defendant by encl. 13 is in effect attempting to obtain indirectly an injunction against Danaharta. By stopping the Receiver and Manager from obtaining possession of the said building the defendant would have restrained Danaharta from its right to realize to charge over the land and building. Under section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 (Act 587) no injunctions order can be made against Danaharta or to affect its decision ...

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Sulaiman Daud JCA after quoting the above passage went on to say this:

We fully agree with the learned Judge. In *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal* [2007] 4 CLJ 513, the Federal Court adopted with approval the decision in *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors* [2002] 2 CLJ 758 and *Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor* [2002] 7 CLJ 175, which held that the court is precluded by the expressed provisions in the said s. 72 from granting any injunction or other restraining orders against the Corporation. Here we would add that the said prohibition also apply to a subsidiary of the Corporation by virtue of s. 60 of the Act.

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[6] It is implicit that this court has already held in *Marina Mohd Yusoff v. Pekeliling Triangle Sdn Bhd* that an injunction granted against a receiver and manager would indirectly contravene s. 72 of the act. We must adopt and apply the decision in *Marina Mohd Yusoff* because this court is bound by its own decisions: *Hendry v. Druz* [1949] MLJ Supp 25. We have accordingly no alternative but to uphold the decision of the learned judge in this case.

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[7] A sustained argument was made to us on the position of the receivers and managers. Counsel for the 3rd respondent referred us to the following passage in the judgment of *Jenkins LJ Re B Johnson & Co, Ltd* [1955] 2 All ER 775, 790:

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...whereas a receiver and manager for debenture-holders is a person appointed by the debenture-holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture and as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture-holders. The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and management pending sale, and

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- A with full discretion as to the exercise and mode of exercising those powers. The primary duty of the receiver is to the debenture-holders and not to the company. He is receiver and manager of the property of the company for the debenture-holders, not manager of the company. The company is entitled to
- B any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. The whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.
- C [8] Our attention was also drawn to the decisions of the English Court of Appeal in *Gomba Holdings UK Ltd and Others v. Minorities Finance Ltd and Others* [1989] 1 All ER 261 and *Silven Properties Ltd and Another v. Royal Bank of Scotland Plc and Others* [2004] 4 All ER 484. In *Gomba Holdings* Fox LJ described the
- D agency of a receiver as follows:
- E The agency of receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit of the debenture holder, are treated as if they were the acts of the mortgagor. The relationship set up by the debenture, and the appointment of the receiver, however, is not simply between the mortgagor and the receiver. It is tripartite and
- F involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder on the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter of contract between the mortgagor and the debenture holder, the mortgagor will have to pay the receiver's fees. Further, the
- G mortgagor cannot dismiss the receiver since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership.
- H All this is far removed from the ordinary principal and agent situation so far as the mortgagor and the receiver are concerned. Whilst the receiver is the agent of the mortgagor he is the appointee of the debenture holder and, in practical terms, has a close association with him. Moreover, he owes fiduciary duties to
- I the debenture holder who has a right, as against the receiver, to be put in possession of all information concerning the receivership available to the receiver:

[9] In *Silven Properties* at p. 494, Lightman J, stated:

The character and incidents of such receivers' agency has been the subject of judicial and extra judicial consideration. Per Millet QC (as he then was) in "The Conveyancing Powers of Receivers After Liquidation" (1977) 41 Conv (NS) 83 at 88 wrote: '... the so-called "agency" of the [receivers] is not a true agency, but merely a formula for making the company, rather than the [mortgagee], liable for his acts ...'"

And at p. 495 of the judgment he went on to say:

In the context of a relationship such at the present, which is no ordinary agency and is primarily a device to protect the mortgagee, general agency principles are of limited assistance in identifying the duties owed by the receiver to the mortgagor: see *Gomba Holdings UK Ltd v. Homan* [1986] 3 All ER 94 at 97, [1986] 1 WLR 1301 at 1305 per Hoffman J; *Gomba Holdings UK Ltd v. Minorities Finance Ltd* [1989] 1 All ER 261 at 263, [1988] 1 WLR 1231 at 1233 per Fox LJ. The core duty of the receiver to account to the mortgagor subsists, but (for example) the mortgagor has no unrestricted right of access to receivership documents. The mortgage confers upon the mortgagee a direct and indirect means of securing a sale in order to achieve repayment of his secured debt. The mortgagee can sell as mortgagee and the mortgagee can appoint a receiver who likewise can sell in the name of the mortgagor. Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property.

[10] No doubt these cases set out the position of a receiver and manager at English common law based on the equipollent UK Companies legislation. But the law in this country may not be the same because of s. 192(2) of the Companies Act 1965. That section provides:

If it appears that any receiver or manager of the property of a company has misapplied or retained or become liable or accountable for any money or property of the company or being guilty of misfeasance or breach of trust or duty in relation to the company, the court may on the application of any creditor or contributory or of the liquidator examine into the conduct of the receiver or manager and compel him to repay or restore the

- A money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks fit.
- B [11] The subsection obviously creates a remedy that does not exist in common law. That much is clear from a reading of the judgments of Lord Evershed MR and Jenkins, LJ in *Re B Johnson & Co (Builders) Ltd*. We make this point because counsel for the appellants said his clients would be bereft of any remedy if the
- C injunction sought for is not granted. That is not the case. If the receiver and manager be guilty of misconduct, then an application can be made to move the court under s. 192(2) and seek the appropriate relief.
- D [12] For the reasons already given, this appeal is dismissed. The orders of the High Court are affirmed. We direct that the deposit be paid out to the 3rd respondent to account of its costs. A word about costs though. The 1st and 2nd respondents played no part in this appeal. They merely adopted the 3rd respondent's
- E submission. They shall not be entitled to any getting-up on their bill. But they shall be entitled to have their out of pockets and profit costs.

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